

(1999) 04 RAJ CK 0035
In the Rajasthan High Court
Case No : .C.W.P. No. 11 of 1999

PGO Processors Pvt. Ltd.

APPELLANT

Vs

Additional Commissioner

RESPONDENT

Date of Decision : 22-04-1999

Acts Referred:

Central Excise Tariff Act, 1985 — Section 2, 3
Central Excises and Salt Act, 1944 — Section 2, 3
COMPANIES ACT, 1956 — Section 3, 34
Constitution of India, 1950 — Article 226
Customs Tariff Act, 1975 — Section 3
Finance Act, 1997 — Section 3
Penal Code, 1860 (IPC) — Section 109, 116, 161

Citation : (2000) 69 ECC 361

Hon'ble Judges : V.S. Kokje, J;A.S. Godara, J

Bench : Division Bench

Judgement

V.S. Kokje, J.—The petitioner company claiming to be entitled to the benefit conferred by Notification No. 36/98, dated 10.12.1998, which came into force from 16.12.1998 filed a declaration dated 16.12.1998 with the Assistant Commissioner, Central Excise Division, Gandhi Nagar, Bhilwara stating that the petitioner had started working under the said notification as independent processor from 16.12.1998. The petitioner company also submitted to the Assistant Commissioner a declaration under Notification No. 42/98, dated 10.12.1998 giving the required details. It appears that the petitioner company started clearing the goods availing the benefit of Notification No. 36/98 from 16.12.1998 onwards. On 30.12.1998 office of the Commissioner of Central Excise, Jaipur-II wrote to the petitioner in response to the declaration given by the petitioner on 16.12.1998 that the Process House for which the declaration was made was owned by M/s Suzuki Textile Ltd., a Company having proprietary interest in weaving of fabrics also and as the preliminary enquiries conducted by the Department revealed that M/s. Suzuki Textile Ltd., are the processor of fabrics in the factory, till the matter was settled, the request of the petitioner

company for determination of Annual Production in their favour under the scheme could not be entertained. On the same day, the Superintendent, Central Excise, Range-II, Bhilwara wrote to the petitioner enclosing a copy of the letter of the Commissioner's office and advising the petitioner company to follow the directions given in the letter and to clear the excisable goods accordingly. The short levy, if any, on the past clearance was also demanded to be deposited.

2. On 4.1.1999 the petitioner filed this petition challenging the aforesaid direction given by the Central Excise Authorities and praying that the impugned letter dated 30.12.1998 of the Additional Commissioner and the letter dated 30.12.1998 of the Superintendent, Central Excise, Range-II, Bhilwara be quashed. A writ of mandamus directing the Additional Commissioner, respondent No. 1 to entertain the declaration filed by the petitioner and to determine the annual capacity of production of the petitioner's Process House in its favour was also claimed with a prayer that the petitioner be allowed to clear goods availing the benefit of Notification No. 36/98, dated 10.12.1998. An interim order was sought from and granted by this Court allowing the clearance under the Notification on condition that the petitioner shall keep true and correct accounts of the clearance of goods to enable the respondents to realize the differential duty in case the petition fails. The respondents moved an application under Article 226(3) for vacation of the interim order. When the arguments on the application were being heard, the parties agreed that the case be disposed of finally by hearing arguments at that stage only. This is how the case was finally heard by us.

3. The short point involved in the case is as to whether the respondents could refuse to allow the petitioner to clear the goods treating the petitioner as independent processor of fabrics under Notification No. 36/98, dated 10.12.1998 even before deciding finally as to whether they are covered under the notification or not. The contention of the petitioner is that they are covered by the notification issued by the Central Govt. in exercise of powers conferred on it by Section 3A of the Central Excises and Salt Act, 1944 (hereinafter called as the Act) and therefore the excise duty, they are liable to pay, is under Notification No. 36/98, dated 10.12.1998 issued in exercise of powers conferred by Section 3A of the Act. According to the petitioner company, it is not liable to pay duty u/s 3 of the Act being covered by a Notification issued u/s 3A of the Act. The petitioner company also contends that whether it is covered by Notification or not can only be determined after issuing a show cause notice to it as to why its claim be not rejected and after adjudicating upon the cause shown by it. According to the petitioner the respondents themselves have not reached a conclusion finally that the petitioner company is not independent processor and therefore, is not covered by the Notification No. 36/98, dated 10.12.1998. The action taken by the respondents therefore, according to the petitioner, is premature and without authority of law as the Act or the Rules made thereunder do not provide for such a procedure. It is also contended on behalf of the petitioner company that it is independent processor of fabrics though it does not own the plant and machinery

but has taken the same on lease. The petitioner company is registered under the Rajasthan Sales Tax Act, Central Sales Tax Act and has independent telephone connections. It also contends that the Superintendent, Central Excise, Range-II, Bhilwara himself issued a certificate of registration in Form No. R-2 on 3.9.1997 in the petitioner company's favour accepting it to be an independent unit under Rule 174 of the Central Excise Rules. It is also alleged in the petition that though under the job contract between M/s. Suzuki Textile Ltd. and the petitioner company, the petitioner company is obliged to process the entire fabrics of M/s. Suzuki Processors on priority basis, the petitioner company is free to process the fabrics of other parties and the company has been actually processing the fabrics of other parties. It is also alleged that the petitioner company has been regularly submitting price declaration and monthly returns in Form No. RT 12 to the Range Superintendent, Central Excise and has been paying regularly excise duty on fabrics processed by it from time to time and the Superintendent had accepted the payment of excise duty made by the petitioner without raising any objection. It is contended that the respondents have never doubted that the petitioner company was an independent processing unit. The petitioner also pointed out that the respondents themselves have issued a show cause notice to M/s. Suzuki Textile Ltd. alleging that they have transferred capital goods on which they have availed Modvat credit to another manufacturer namely the petitioner. The respondents demanded from M/s. Suzuki Textile Ltd. duty on capital goods transferred/removed after being used to the petitioner company. According to the petitioner, this clearly shows that the Department has all along treated the petitioner's unit as an independent processing unit, different and separate from M/s. Suzuki Textile Ltd. The petitioner therefore claimed that it is independent processor even in the eyes of the Central Excise Department and therefore it is covered by Notification No. 36/98, dated 10.12.1998 and is liable to pay duty only u/s 3A of the Act and not u/s 3 of the Act.

4. In reply it is contended on behalf of the respondents that the petitioner could claim to be covered under Notification No. 36/98 only after its declaration was accepted by the department and not before that. It was submitted that the department had, on investigation, found out material to support the contention that the petitioner company was not independent processor as it had virtually no capital assets, it did not own any land, building, plant or machinery and all these have been taken on lease from M/s. Suzuki Textile Ltd. It was also contended that the entire goods processed by the petitioner company either belong to M/s. Suzuki Textile Ltd, or goods of other manufacturers sent for processing by M/s. Suzuki Textile Ltd. to the petitioner company for processing. It is submitted that the petitioner company is only an instrumentality of M/s. Suzuki Textile Ltd. and is used only as a facade for the purpose of avoiding excise duty.

5. To understand the problem correctly and to analyse it properly we will have to examine the scheme of the Excise Act under which the relevant notifications were issued. Section 3 of the Act is the charging provisions of general application. It provides that the duties specified in the First Schedule and the

Second Schedule to the Central Excise Tariff Act shall be levied and collected in such manner as may be prescribed. The word "prescribed" is defined u/s 2(g) to mean prescribed by Rules made under the Act. Thus, so far as levy of duties u/s 3 is concerned, it has been provided that the duties shall be levied at the rates prescribed in the First and Second Schedules and shall be collected in such manner as prescribed under the Rules.

6. By Finance Act, 1997, Section 3A was introduced in the Act empowering the Central Govt, to charge excise duty on the basis of capacity of production in respect of notified goods. The section begins with a non-obstante clause specifically stating that the power u/s 3A could be exercised by the Central Govt. notwithstanding anything contained in Section 3 of the Act. It is therefore a moot point as to whether the Central Excise Rules framed for levy and collection of duty would be applicable to the levy and recovery of duty in exercise of powers u/s 3A of the Act. We will not deal with this point because it has not been raised specifically in the petition.

Section 3A of the Act reads as under:

Section 3A.--Power of Central Govt. to charge Excise duty on the basis of capacity of production in respect of notified goods:

1. Notwithstanding anything contained in Section 3, where the Central Govt., having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.

2. Where a notification is issued under Sub-section (1), the Central Government may, by rules, provide for determination of the annual capacity of production, or such factor or factors relevant to the annual capacity of production to the factory in which such goods are produced, by the Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

Provided that where a factory producing notified goods is in operation only during a part of the year, the production thereof shall be calculated on proportionate basis of the annual capacity of production.

3. The duty of excise on notified goods shall be levied, at such rate as the Central Govt. may by notification in the Official Gazette specify, and collected in such manner as may be prescribed:

Provided that, where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, duty calculated on a proportionate basis shall be abated in respect of such period if

the manufacturer of such goods fulfils such conditions as may be prescribed.

4. Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under Sub-section (2), the Commissioner of Central Excise shall, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in Sub-section (3).

5. Where the Commissioner of Central Excise determines the actual production under Sub-section (4), the amount of duty already paid, if any, shall be adjusted against the duty so redetermined and if the duty already paid falls short of, or is in excess of, the duty so determined, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

6. The provisions of this section shall not apply to goods produced or manufactured--

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India.

Explanation 1.--For the removal of doubts, it is hereby clarified that for the purposes of Section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), read with any notification for the time being in force.

Explanation 2.--For the purposes of this section the expressions "free trade zone" and "hundred per cent export-oriented undertaking" shall have the meanings assigned to them in Section 3.

7. On 10.12.1998, Notification No. 36/98 was issued giving it effect from 16.12.1998. The relevant portion of the Notification reads as under:

Notification No. 36/98:

In exercise of the powers conferred by Sub-section (3) of Section 3A of the Central Excise Act, 1944 (1 of 1944), the Central Govt. hereby specifies that the rate of excise duty on processed textile fabrics falling under heading Nos. 52.07, 52.08, 52.09, 54.06, 54.07, 55.11, 55.12, 55.13 and 55.14 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), manufactured or produced by an independent processor with the aid of a hot-air stenter shall:

(i) in the case of a processing factory whose average value of processed fabrics is up to and including Rs. 30 per sq.m. 12.8 per cent, of the capacity of production in value terms per chamber per month, equivalent to Rs. 1.5 lakhs per chamber per month, and

(ii) in the case of a processing factory whose average value of processed fabrics

is exceeding Rs. 30 per sq.m. 12.8 per cent, of the capacity of production in value terms per chamber per month, equivalent to Rs. 2 lakhs per chamber per month;

On the basis of the number of chambers (of a hot-air stenter) and the average value of the processed textile fabrics determined under the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998.

(2) ...

(3) ...

(4) ...

(5) Notwithstanding anything contained above, the independent processor of processed textile fabrics shall not be eligible to avail any credit of duty paid on inputs or capital goods under the Central Excise Rules, 1944 or any notification issued thereunder.

(6) Nothing contained in this notification shall apply to--

(a) any goods manufactured or produced prior to the 16th day of December, 1998 and cleared on or after that date;

(b) a composite mill, i.e. a manufacturer or processor, who is engaged in the processing of fabrics with the aid of power along with the spinning of yarn from fibres and weaving or knitting or crocheting of fabrics within the same factory and includes a multi-locational composite mill, i.e. , a public limited company which is engaged in the processing of fabrics with the aid of power along with the spinning of yarn from fibres and weaving or knitting or crocheting of fabrics in one or more factories owned by the same public limited company.

(7) This notification shall come into effect from the 16th day of December, 1998.

Explanation I.--Unless otherwise specified in any rule made u/s 3A of the Central Excise Act, 1944 (1 of 1944), for the purposes of this notification, the goods shall be deemed to have been manufactured or produced with the aid of a hot-air stenter, if they are cleared from a factory where a hot-air stenter is installed, irrespective of whether it is in use or in working condition, or is otherwise.

Explanation II. - For the purposes of this notification, an "independent processor" means a manufacturer who is engaged exclusively in the processing of fabrics with the aid of power and who also has the facility in his factory (including plant and equipment) for carrying out heart-setting with the aid of power or steam in a hot-air stenter, and who has no proprietary interest in any factory engaged in the spinning of yarn or weaving of fabrics.

8. The Central Govt. framed Rules for determination of annual capacity of production in exercise of powers conferred by Sub-section (2) of Section 3A of the Act by Notification No. 42/98, dated 10.12.1998. The relevant proportions of this notification are reproduced hereunder:

Notification No. 42/98:

In exercise of the powers conferred by Sub-section (2) of Section 3A of the Central Excise Act, 1944 (1 of 1944), the Central Govt, hereby makes the following rules to provide for determination of the annual capacity of production of certain goods notified under Sub-section (1) of said Section 3A, namely:

(1)(i) These rules may be called the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998.

(ii) They shall come into force with effect from the 16th day of December, 1998.

(2) These rules shall apply to processed textile fabrics falling under heading Nos. 52.07, 52.08, 52.09, 54.06, 54.07, 55.11, 55.12, 55.13 or 55.14 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) for determining the annual capacity of production of an independent processor if such textile fabrics are manufactured or produced with the aid of a hot-air stenter.

(3) The annual capacity of production referred to in Rule 2 shall be determined in the following manner, namely--

(1) An independent processor shall declare--

(i) the number of hot-air stenters installed in his factory;

(ii) the name of the manufacturer of each of the hot-air stenter, its identification No. and the date of its purchase;

(iii) the number and size (both the length and width in centimetres) of chambers in each of the hot-air stenters;

(iv) the total value of processed fabrics referred to in Rule 2, produced or manufactured in the preceding financial year; and (v) the total quantity of processed fabrics referred to in Rule 2, produced or manufactured in the preceding financial year;

to the Commissioner of Central Excise (hereinafter referred to as the Commissioner), with a copy to the Assistant Commissioner of Central Excise.

(2) On receipt of the declaration referred to in Clause (1), the Commissioner shall take necessary action to verify its correctness and ascertain the correct value of each of the parameters given in such declaration. The Commissioner may, if he so desires, consult any technical authority for this purpose.

(3) The annual capacity of production of processed textile fabrics specified in Rule 2 in respect of a factory of an independent processor shall be determined keeping in view the following factors, namely--

(i) ...

(ii) ...

(iii)

(iv) the average value of production per chamber per month as--

(a) in the case of fabrics of average value of up to and including Rs. 30 per square metre, Rs. 11.72 lakhs, and

(b) in the case of fabrics of average value of exceeding Rs. 30 per square metre, Rs. 15.63 lakhs.

(4) The Commissioner of Central Excise shall, as soon as may be, after determining the annual capacity of production on the basis of the average value of processed textile fabrics and the number of chambers (of a hot-air stenter) of the factory of the independent processor, by an order, intimate the same as also the rate of duty applicable to the independent processor:

Provided that the Commissioner may determine the annual capacity of production on provisional basis pending verification of the declaration furnished by the independent processor and pass an order, accordingly. Thereafter, the Commissioner may determine, the annual capacity, as soon as may be, and pass an order accordingly.

(4) ...

(5) ...

Explanation I ...

Explanation II ...

Explanation III - For the purposes of this notification, an independent processor" means a manufacturer who is engaged exclusively in the processing of fabrics with the aid of power and who also has the facility in his factory (including plant and equipment) for carrying out heat-setting with the aid of power or steam in a hot-air stenter, and who has no proprietary interest in any factory engaged in the spinning of yarn or weaving of fabrics.

Explanation IV ?

9. A combined reading of Section 3A and the notifications issued thereunder would show that these provisions were made to avoid evasion of duty by making provisions for charging the duty on the basis of capacity of production. Section 3A does not speak of the status of the manufacturer as to whether he is an independent processor or otherwise. Section 3A empowers the Central Govt. to issue notifications under it specifying certain goods as notified goods and providing for levy and collection of excise duty on such goods. In accordance with the provisions of Section 3A of the Act, the power could be exercised if the Central Govt. was of the opinion, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, that it was necessary to safeguard the interest of revenue. Thus

Section 3A speaks of goods of specified description only and does not speak of the status of the manufacturer of such goods. It is again a moot point whether the status of the manufacturer as an independent processor could be considered to be a relevant factor for the purpose of the Section and different types of manufacturers of the same goods of a certain specified description could be put in different classes for the purpose of charging excise duty u/s 3 or Section 3A of the Act. As this point has not been specifically taken, it need not detain us.

10. The Notification No. 36/98 while specifying the rates of excise duty on textile factories falling under certain tariff entries of the Schedule-II qualifies them by using the words "manufactured or produced by an independent processor with the aid of hot-air stenter". Explanation II defines the term "independent processor" to mean a manufacturer who is engaged exclusively in the processing of fabrics with the aid of power and who also has the facility in his factory (including plant and equipment) for carrying out heat-setting with the aid of power or steam in a hot-air stenter and who has no proprietary interest in any factory engaged in the spinning of yarn or weaving of fabrics. Notification No. 36/98 prescribes the maximum rate of excise duty under the notification to be Rs. 2.00 Lakhs per chamber per month.

11. The Notification No. 42/98 prescribes procedure for determining the annual capacity of the independent processors. The independent processor is again defined in the same terms as is defined in Notification No. 36/98. However, the notifications do not provide as to what would be the procedure for determining the claim of an Assessee to be an independent processor for the purpose of the notifications. In the present case, the ultimate question is as to whether the claim of the petitioner to be an independent processor is correct or not and whether the petitioner is entitled to clear the goods on payment of duty u/s 3A of the Act without the decision of the authorities on the question or not? A peculiar situation has arisen where the petitioner claims to be a manufacturer of goods falling under the tariff items specified in the Notification No. 36/98, and claims to be charged u/s 3A only and not u/s 3 of the Act and the respondents are not processing his declaration under the notifications on the ground that it is yet to be determined as to whether he is an independent processor or not.

12. The respondents have filed a show cause notice issued after the filling of this petition on 15-1-1999 to M/s. Suzuki Textile Ltd. as also to the petitioner company, its Directors and General Manager. In this show cause notice the validity of a lease agreement between M/s Suzuki Textile Ltd. and the petitioner company itself has been doubted. The job contract agreement between Suzuki Textiles Ltd. and the petitioner company was also doubted. It was also doubted as to whether the petitioner company had any viable working capital or funds of their own for operations of the Process House and on the basis of all this, a doubt was expressed that the unit of the petitioner company was nothing but a front or a facade put up by Suzuki Textiles Ltd. to avoid payment of excise duty. The petitioner company and its Directors were required to show cause as to why the

Registration Certificate granted to the petitioner company under Rule 174 of the Central Excise Rules, 1944 should not be revoked as they did not appear to be manufacturer within the meaning of Section 2F of the Central Excise Act, 1944 and penalties be not imposed on them under Rule 209A of the Central Excise Rules, 1944. This show cause notice does not at all talk about the declaration filed under the notifications issued u/s 3A of the Act. It does not require the petitioner company to show cause as to why it be treated not to be an independent processor within the meaning of Notification Nos. 36/98 and 42/98 issued u/s 3A of the Act. If the respondents are of the opinion that the claim of the petitioner company to be entitled or liable to pay duty only u/s 3A of the Act being covered by Notifications Nos. 36/98 and 42/98 is incorrect, a hearing will have to be given to the petitioner company specifically on that subject and the processing of declarations filed by the petitioner company under Notification Nos. 36/98 by following the procedure prescribed by Notification No. 42/98 cannot be stopped or stalled on the ground that the respondents have doubts about the status of the petitioner's Unit as an independent processor. The question whether the petitioner is an independent processor or not will have to be answered on the basis of the definition of "independent processor" given in the two notifications. When the petitioner's unit has been independently registered and there is no allegation as yet that the petitioner company has any proprietary interest in any factory engaged in the spinning of yarn or weaving of fabrics, the processing of declaration given by the petitioner company under Clause 3 of Notification No. 42/98 98 cannot be stopped or stalled on the excuse that the respondents doubt the status of the petitioner company as an "independent processor".

13. Actually, the respondents in their communication dated 30-12-1998 have expressed doubt about the petitioner's ownership or proprietorship of the processing unit. They state that their investigation revealed that the processing unit claimed to be taken on lease by the petitioner company is in fact of the ownership of M/s. Suzuki Textile Ltd. According to the respondents, the processing unit in fact and reality belonged to M/s. Suzuki Textile Ltd. who is also engaged in the activity of manufacturing yarn and fabrics, and therefore is not entitled to the benefit under the Notification. Thus, the ground on which the clearance of goods has been stopped is that the petitioner company has no processing unit of its own at all and the unit claimed to be run by it is in reality a unit owned and run by M/s. Suzuki Textiles Ltd. In the face of registration of the petitioner's unit under Rule 174 of Central Excise Rules this contention cannot be countenanced till the registration is cancelled by following a process prescribed by law and principles of natural justice.

14. Rule 174 of the Central Excise Rules reads as under:

Rule 174.--Registration of certain persons.--(1) Every person who cures, produces, manufacturers, carries on trade, deals as a broker or commission agent, holds private store-room or warehouse or otherwise uses excisable goods

(or a person who issues invoice or invoices under Rule 57(g) or, as the case may be, Rule 57(T) shall get registered and shall not engage in the curing, production, manufacture, trade, dealing as broker or commission agent, storing in private store-room or warehouse or use excisable goods without having applied for such registration to the jurisdictional range officer or such officer in such forms as may be specified by the Board.

(2) The Central Board of Excise and Customs, may, by notification in the Official Gazette, and subject to such conditions or limitations as may be specified in such notification, specified person or class of persons from amongst the persons specified in Sub-rule (1) who need not obtain such registration.

(3) If there are more than one premises requiring registration he shall obtain separate registration certificates for each of the premises.

(4) Every registration certificate granted shall be in the specified form and shall be valid only for the premises specified in such certificate.

(5) Where a registered person transferred his business to another person, the transferee shall obtain a fresh certificate.

(6) Where a registered person is a Firm or a Company or Association of persons, he may change in the constitution of such a firm, company or association of persons, shall be intimated to the Central Excise Officer within 30 days of such a change for incorporation in the certificates.

(7) In case a registered person decides to manufacture a new product, he shall get the product endorsed on his registration certificate.

(8) Every registered person, who ceases to carry out the operation or operations he is registered for, shall surrender his registration certificate immediately.

(9) The proper officer shall proceed to grant a registration certificate under this Rule within thirty days of the receipt of an application. If registration certificate is not granted within the said period, the registration applied for shall be deemed to have been granted.

(10) Every registered person shall exhibit his registration certificate (or a certified copy thereof) in a conspicuous part of the registered premises.

(11) Any registration certificate granted under this rule may be revoked or suspended by the proper officer, if the holder or any person in his employ, is found to have committed a breach of any conditions of the Act or these rules or has been convicted of an offence u/s 161, read with Section 109 or with Section 116 of the Indian Penal Code.

15. The petitioner company has produced the registration certificate granted to it under the aforesaid rule as Annexure-10 to the petition. A perusal of this certificate would show that the registration has been granted for the purpose of curing, producing, manufacturing, carrying on wholesale trade/business/business

as broker or commission agent or for otherwise dealing in excisable goods for special industrial purpose. Schedule to the registration certificate specifies the description of goods for the manufacture of which the registration has been granted as "woollen fabrics, cotton fabrics, man-made blended fabrics. The purpose of registration has been specified as manufacture (processing of fabrics). Thus the registration certificate shows that the petitioner's unit has been recognised as a manufacturer/processor of fabrics. The petitioner being a company duly registered under the Companies Act, 1956, is a distinct and separate juristic person by virtue of Sec. 34 of the Companies Act, 1956. It has a legal personality of its own distinct and separate from its individual members and shareholders. Hence the Registration Certificate granted to the petitioner company will have to be taken as valid recognition of its status as distinct and separate manufacturer or processor irrespective of the activities of its members or shareholders, so long as it is not revoked or suspended under Sub-rule (11) of Rule 174. We are not called upon to express our views as to whether in such matters, the identity and unity of interest of two companies can be established by piercing through the veil and one company can be taken to be in reality a part or extension of another company created only for the purpose of evasion of tax or duty.

16. Sub-rule (11) of Rule 174 provides that any registration certificate granted under the Rules may be revoked or suspended on breach of any conditions of the Act or the rules or on conviction of the person on charge of abetment of an offence of taking illegal gratifications. The respondents have to take action for revocation or suspension of registration granted under Rule 174 if they want to derecognise the petitioner company as separate manufacturer or independent processor. This can be done only after following the principles of natural justice which require an adequate and proper hearing to be given before revocation/suspension of the Registration.

17. The respondents have issued show cause notice for cancellation of registration certificate granted under Rule 174 of the Central Excise Rules though they have not issued it for revocation/suspension of the registration certificate and have not as yet decided to revoke/suspend the registration certificate. Grounds on which registration certificate once granted can be revoked/suspended under Sub-rule (11) of Rule 174 have also not been taken in the show cause notice which has been issued on the premises that the petitioner company does not own the unit and in fact the units is owned by M/s. Suzuki Textiles Ltd. They cannot therefore contend that the petitioner company is not an independent manufacturer or independent processor at this stage and cannot stop the petitioner company from exercising its right to clear goods on payment of excise duty u/s 3A of the Act and notifications issued thereunder.

18. The action of the office of the Commissioner, Central Excise Jaipur-II in not processing the declaration filed by the petitioner company cannot therefore be sustained. The communication dated 30-12-1998 Annex-25 to the petition states

that in view of the fact that preliminary enquiries had revealed that M/s. Suzuki Textiles Ltd. are the processor of the fabrics in the factory, till the matter is settled the request of the petitioner company for determination of the annual production in their favour under the scheme could not be entertained. This clearly means that the respondents have refused to entertain the claim of the petitioner company that they are liable to pay duty under the notifications issued under Sections 3A of the Act without giving any opportunity of hearing to it and without following the procedure prescribed by Notification No. 42/98. The impugned action deserves to be, and is, hereby quashed.

19. The letter dated 30-12-1998 issued by the Superintendent, Central Excise, Range-II, Bhilwara to the petitioner company advising it to follow the directives given in the letter dated 30-12-1998 issued by the Office of the Commissioner, Central Excise, Jaipur-II and to clear the excisable goods accordingly and to deposit the short levy, if any, on the past clearance clearly indicates that petitioner company had started clearing goods on the basis of Notification No. 36/98. Sub-clause (iv) of Clause 3 of the Notification No. 42/98 provides that the Commissioner of Central Excise shall, as soon as may be, after determining the annual capacity of production on the basis of average value of processed textile fabrics and the number of Chambers of a hot-air stenter of the factory of the independent processor, by an order, intimate the same as also the rate of duty applicable to the independent processor. The Commissioner of Central Excise has also been given authority to determine annual capacity of production on provisional basis pending verification of the declaration furnished by the independent processor and to pass an order accordingly. Since the dispute in this case is not relating to the correctness of the declaration or any difference of opinion on fulfilment of parameters on which the declaration is to be decided or verified it would be proper to direct the respondents to allow clearance of goods by the petitioner company on provisional basis on payment of maximum duty as per Sub-clause (ii) of the Clause 1 of Notification No. 36/98 till the question of applicability of the notification to the petitioner company is determined by the respondents after giving adequate and proper opportunity of hearing in accordance with law to the petitioner company on the question of applicability of the notifications to it keeping in view the observations made in this order. Accordingly, we direct that the respondents shall allow clearance of excisable goods to the petitioner on payment of maximum duty under the notifications provisionally on the basis that it is independent processor covered by Notification Nos. 36/98 and 42/98, dated 10-12-1998 issued in exercise of powers u/s 3A of the Act till the question of applicability of notifications to them is finally decided by the respondents by following the due process of law. There shall be no order as to costs.